

TECHNICAL AMENDMENT
May 4, 2018

400 KAR 1:090. Administrative hearings practice provisions.

RELATES TO: KRS 146.200-146.360, 146.450, 146.530, 146.990, 149.344, 149.346, 149.348, 151.125, 151.182, 151.184, 151.297, 151.990, Chapters 223, 224, 350.028, 350.029, 350.0301, 350.0305, 350.032, 350.060, 350.070, 350.085, 350.090, 350.093, 350.130, 350.240, 350.255, 350.300, 350.305, 350.465, 350.610, 350.990, 30 C.F.R. Parts 724, 730, 731, 732, 733, 735, 917, 39 C.F.R., 30 U.S.C. 1253, 1255

STATUTORY AUTHORITY: KRS 146.270, 146.450, 146.990, 149.344, 149.346, 151.125, 151.182, 151.184, 151.186, 151.297, 223.200, 223.991, 224.10-100, 224.10-410, 224.10-420, 224.10-430, 224.10-440, 224.40-310, 224.60-120, 350.020, 350.028, 350.029, 350.0301, 350.0305, 350.240, 350.255, 350.300, 350.465, 350.610, 30 C.F.R. Parts 724, 730, 731, 732, 733, 735, 917, 30 U.S.C. 1253, 1255

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapters 146, 149, 151, 223, 224, and 350 authorize the cabinet to conduct administrative hearings and authorize the cabinet to promulgate administrative regulations to regulate the administrative hearing process. This administrative regulation establishes procedures for conducting administrative hearings, administrative conferences, mediations, and issuance of final orders in regard to violations and final determinations of the cabinet made pursuant to KRS Chapters 146, 149, 151, 223, 224, and 350.

Section 1. Applicability. This administrative regulation establishes procedures for conducting an administrative hearing, administrative conference, mediation, and issuance of a final order in regard to a violation and a final determination of the cabinet made pursuant to KRS Chapters 146, 149, 151, 223, 224, and 350.

Section 2. Assignment of a Case Number and Caption. (1) Assignment of a case number.

(a) If the office receives an initiating document, filed in accordance with Section 3 of this administrative regulation by a person other than the cabinet, the office shall assign a case number to that document.

(b) If the initiating document is filed by the cabinet's Office of General Counsel, the Office of General Counsel shall assign the case number to the document at the time of filing.

(2) Caption requirements. Any person filing an initiating document, or pleading in the office shall state:

(a) The case number in accordance with subsection (1) of this section;

(b) The permit number if it relates to a permit;

(c) The noncompliance number if it relates to a notice of noncompliance and order for remedial measures as defined in 400 KAR 1:110~~[405 KAR 7:092]~~, Section 1;

(d) The cessation order number if it relates to a cessation order as defined in 400 KAR 1:110~~[405 KAR 7:092]~~, Section 1;

(e) The agency interest number, if known;

(f) The petitioner name;

(g) The respondent name; and

(h) Any intervenor name.

(3) Any person filing an initiating document in the office shall state in the caption of the document, the name and address of the person to be served on behalf of each respondent.

(4) Consolidated case caption. A pleading filed in a consolidated case shall list all consoli-

dated case numbers. If a pleading filed in a consolidated case pertains to some, but not all, of the consolidated cases, the party filing the document shall indicate the case to which the document applies.

Section 3. Filing and Retention of a Pleading or Discovery Material. (1) Filing of a pleading.

(a) Any person filing a pleading in the office shall file the original pleading with the office.

(b) A pleading may be initially filed by facsimile or electronic mail pursuant to the requirements in subparagraphs 1. and 2. of this paragraph. A person filing by facsimile or electronic mail shall, after sending the document via facsimile or by electronic mail, file the original of the document with the office.

1. Facsimile.

a. A person filing a pleading in the office may file the pleading by facsimile at the facsimile number listed for the office.

b. The facsimile pleading shall be stamped filed according to the time and date stamp placed on the facsimile pleading by the office facsimile machine and shall be filed in the record upon retrieval from the office facsimile machine.

c. If the office facsimile machine malfunctions, the facsimile pleading shall be stamped as of the date actually received in the office.

2. Electronic mail.

a. A person filing a pleading in the office may file the pleading by electronic mail at the electronic mail address listed for the office, not the electronic mail address of the assigned hearing officer.

b. The pleading shall be filed as a searchable Portable Document Format (PDF). If the pleading is not electronically mailed in a Portable Document Format, it shall not be accepted by the office.

c. The electronic mail pleading shall be stamped filed according to the time and date placed on the electronic mail pleading as received by the office computer and shall be filed in the record upon retrieval from the office computer.

d. If the office electronic mail server fails, the document shall be stamped as of the date actually received in the office.

(c) The original pleading shall be file stamped on the date actually received by the office. The effective date of filing shall be the earlier date of the receipt in the office of either the facsimile, the electronic mail, or the original.

(d) Filing of discovery material.

1. Except as provided by subparagraph 3 of this paragraph, the following documents shall not be filed with the office unless the hearing officer issues an order otherwise:

a. Interrogatory;

b. Request for production or inspection; and

c. Request for admission.

2. The party responsible for the service of the discovery material shall retain the original and become the custodian. The custodian shall provide access to any party of record during the pendency of the action.

3. If a document listed in paragraph (d)1. of this section is to be used at the administrative hearing or in support of a pleading, then the document shall be filed in the office at the beginning of the administrative hearing or at the time the pleading is filed.

(2) Official record.

(a) Each pleading, book, record, paper, or map received in evidence in an administrative hearing or submitted for the record in a proceeding before the office shall be retained in the official record. The replacement of an original document with an accurate photocopy may be

permitted while the case is pending upon terms and conditions as may be ordered by the hearing officer.

(b) If a final order of the secretary has been entered, the hearing officer may, upon request and after notice to each party, authorize the replacement of an original document with an accurate photocopy.

(3) Signature and record address.

(a) Contact information. A person who files a pleading in the record shall sign the document and shall state the person's:

1. Mailing address;
2. Electronic mail address, if available;
3. Facsimile number, if available; and
4. Telephone number.

(b) Change of contact information. If any of the information that is required to be provided in paragraph (a) of this subsection changes, the person shall within fourteen (14) days of the change, file a notice of change of information in the office identifying each case number in which the person has made a filing.

(4) Submission of authority. If a person filing a pleading relies upon a pertinent case decision or other legal authority in the pleading, the person may file with the pleading a copy of the case decision or other legal authority. If the person files a copy of authority, the person shall serve upon each party in the case a copy of the case decision or other legal authority with the pleading.

(5) Format requirements. Each pleading filed with the office shall conform to the requirements established in paragraphs (a) and (b) of this subsection.

(a) Paper size and binding. The pleading shall be on eight and one-half (8 1/2) inches by eleven (11) inches paper stock; and

(b) Type size and style. The document shall be typed in a twelve (12) point font.

(6) Electronic recording and transcript.

(a) An administrative hearing and proceeding before the office shall be electronically recorded.

(b) A digital copy of the electronic recording shall be provided by the office upon request.

(c) The cost of a transcript shall be borne by the requesting party and prepared by a certified court reporter pursuant to a contract between the reporter and the cabinet. The cost of the transcript shall be at the rate established by the contract.

(d)~~(e)~~ Requirement to file transcript with the office.

1. Any party who obtains a transcript of a proceeding before the office and who cites to, quotes from or otherwise relies upon that transcript in any pleading filed with the office, shall file a complete copy of the transcript in the record in the office, unless a copy of the transcript was previously filed in the record.

2. The transcript shall be filed no later than the date upon which the party first cites to, quotes from or relies upon the transcript in any pleading filed with the office.

3. If the party fails to file the transcript with the office that is cited, quoted, or otherwise relied upon in a pleading, the hearing officer may strike all or part of the pleading that refers to the transcript.

Section 4. Time. (1) Computation.

(a) In computing any period of time prescribed or allowed by order of the hearing officer or administrative regulation, the day of the act, event, or default after which the designated period of time begins to run shall not be included.

(b) The last day of the period so computed shall be included, unless it is a Saturday, a Sun-

day, or a legal holiday, in which event the period shall run until the end of the next day that is not a Saturday, a Sunday, or a legal holiday.

(c) If the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

(d) If a person has the right or is required to perform an act within a period prescribed by order of the hearing officer or administrative regulation after the service of a notice or other pleading upon the party and the notice or pleading is served by mail, three (3) days shall be added to the prescribed period. This provision shall not apply to the service of administrative summons and an initiating document by mail.

(2) Extensions of time.

(a) A motion for an extension of time shall be filed within the time allowed for filing the pleading. The hearing officer, upon cause shown, may order the period extended. If the motion is made after the expiration of the time allowed for filing the pleading, the hearing officer may order the period extended if the failure to act was the result of excusable neglect.

(b) The hearing officer shall not extend the time for filing an initiating document pursuant to the applicable statute of limitations, or if the extension is contrary to any other law or administrative regulation.

Section 5. Administrative Summons and Service of Process. (1) Upon receipt of an initiating document, the office shall serve a copy of the initiating document upon each party designated on the initiating document to be served along with an administrative summons. The office shall serve the initiating document in accordance with the method designated on the initiating document and subsection (4) this section.

(2) The administrative summons shall:

(a) Notify the respondent that an initiating document has been filed against the respondent and unless a written defense is timely served, action adverse to the respondent's interest may be taken;

(b) Designate the date, time, and place of the prehearing conference or administrative hearing; and

(c) Include a statement of the legal authority for the administrative hearing and reference to the statutes and administrative regulations involved.

(3) Service shall be made pursuant to one of the methods in subparagraphs (a) through (k) of this subsection.

(a) Individual within the Commonwealth. Service shall be made upon an individual within the Commonwealth, other than an unmarried infant or person of unsound mind, by delivering a copy of the administrative summons and initiating document to the person or, if acceptance is refused, by offering personal delivery to the person, or by delivering a copy of the administrative summons and initiating document to an agent authorized by appointment or by law to receive service of process for the individual.

(b) Unmarried infant or person of unsound mind. Service shall be made upon an unmarried infant or a person of unsound mind by serving the person's resident guardian or committee if there is one (1) known to the initiating party or, if none; by serving either the person's father or mother within this state or, if none, by serving the person within this state having control of the individual. If there are no persons, application shall be made to the appropriate court to appoint a practicing attorney as guardian ad litem who shall be served. If any person directed by this section to be served is also an initiating party, the person who stands first in the order named who is not an initiating party shall be served.

(c) Partnership or unincorporated association. Service shall be made upon a partnership or unincorporated association subject to suit under a common name by serving:

1. A partner or managing agent of the partnership;
2. An officer or managing agent of the association; or
3. An agent authorized by appointment or by law to receive service on its behalf.

(d) Corporation. Service shall be made upon a corporation by serving an officer or managing agent thereof, or any other agent authorized by appointment or by law to receive service on its behalf.

(e) Person issued a permit, registration, or certification from the cabinet. Service shall be made at the address specified in the permit, registration, registration application, certification, or certification application, exploration notice or exploration application pursuant to 405 KAR 8:020 upon:

1. A person issued a permit, registration, or certification by the cabinet;
2. A person specified as an operator in the permit; or
3. The person's named agent for service stated in the permit, registration, registration application, certification, or certification application.

(f) Commonwealth or agency other than the cabinet. Service shall be made upon the Commonwealth or any agency other than the cabinet by serving the attorney general or any assistant attorney general.

(g) Cabinet. Service of a request for an administrative hearing shall be made upon the cabinet by serving the Executive Director of the Office of General Counsel.

(h) County, city, public board, or other administrative body except state agencies.

1. Service shall be made upon a county by serving the county judge or, if the judge is absent from the county, the county attorney.

2. Service shall be made upon a city by serving the chief executive officer of the city or an official attorney of the city.

3. Service on any public board or other administrative body, except state agencies, shall be made by serving a member.

(i) Nonresident. Service may be made upon a nonresident individual who transacts business through an office or agency in this state, or a resident individual who transacts business through an office or agency in any action growing out of or connected with the business of an office or agency, by serving the person in charge.

(j) Out of state individual. Service may be made upon an individual out of this state, other than an unmarried infant, a person of unsound mind or a prisoner, by any method stated in subsection (4) of this section.

(k) Unknown person. In an action against a person whose name is unknown to the initiating party, the person shall be described in the initiating document and administrative summons as unknown party. If the person's name or place of residence is discovered during the action, then the initiating document shall be amended accordingly.

(4) Methods of service. The office shall place a copy of the document to be served in an envelope and address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions provided by the initiating party. The office shall employ one (1) of the methods of service in paragraphs (a) through (c) of this subsection as directed by the petitioner on the initiating document in accordance with Section 2(3) of this administrative regulation.

(a) Certified mail.

1. The office shall affix adequate postage and place the sealed envelope in the United States mail as certified mail return receipt requested.

2. The office shall enter the fact of mailing in the record and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, that fact shall be entered in the record.

3. The office shall file the return receipt or returned envelope in the record;

(b) Personal service.

1. The office shall cause the envelope to be transferred for service to a person authorized by the secretary or by a statute to deliver it, or to a person authorized to serve an action in a court of law who shall serve the initiating document.

2. The office shall enter the fact of delivery in the record and make a similar entry when the return receipt from the authorized person is received.

3. If the return receipt is returned with an endorsement showing failure of delivery, that fact shall be entered in the record. The return receipt shall be proof of the time and manner of service; or

(c) Other method allowed by law. Any other method of service authorized by statute, administrative regulation, or the civil rules for an action in a circuit court of the Commonwealth of Kentucky shall be supplemental to and shall be accepted as an alternative to any of the methods of service specified in subsections (3) or (4) of this section.

(5) Proof of service. The return receipt shall be proof of acceptance, refusal, inability to deliver, or failure to claim the document. The return receipt shall also be proof of the time, place, and manner of service. Service shall be effective upon:

(a) Acceptance of the summons by any person eighteen (18) years of age or older at the permanent address;

(b) Refusal to accept the summons by any person at the permanent address;

(c) The United States Postal Service's inability to deliver the certified mail containing the summons if properly addressed pursuant to Section (4) of this section;

(d) Failure to claim the certified mail containing the summons prior to its return to the cabinet by the United States Postal Service; or

(e) To the extent the United States postal regulations, 39 C.F.R., allow authorized representatives of local, state, or federal governmental offices to accept and sign for "addressee only" mail, signature by the authorized representative shall constitute service on the addressee.

Section 6. Service of a Pleading and Discovery Material. (1) Service is required. Except as provided in subsections (2) or (5) of this section, a party, including a person filing a motion for intervention, shall serve the following pleadings or other documents upon each party in the proceeding:

(a) Every order required by its terms to be served;

(b) Every pleading subsequent to the original initiating document; and

(c) Every document relating to discovery required to be served upon a party.

(2) Service requirement for a party in default. If a secretary's order of default has been entered against a party for failure to appear, then that party shall not be required to be served pursuant to subsection (1) of this section. The defaulting party shall only be given notice of a pleading asserting a new or additional claim for relief against the defaulting party by an initiating document and summons issued thereon.

(3) How service is made.

(a) If service is required pursuant to subsection (1) of this section or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the hearing officer.

(b) Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney's or party's last known address. Delivery of a copy shall include:

1. Handing it to the attorney or to the party;

2. Leaving it at the attorney's or party's office with the person in charge thereof; or, if there is

no one in charge, leaving it in a conspicuous place therein; or

3. If the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(c) Service by mail shall be complete upon mailing unless the serving party learns or has reason to know it did not reach the person to be served.

(4) Proof of service.

(a) Proof of the time and manner of service shall be filed in the office before the hearing officer or the party is required to take action.

(b) Proof may be by:

1. Certificate of a member of the bar;
2. Affidavit of the person who served the document; or
3. By any other proof satisfactory to the hearing officer.

(c) The certificate or affidavit shall identify by name the person served.

(5) Service on numerous respondents. If there are numerous respondents, the hearing officer may designate one (1) respondent for the service of each document.

Section 7. Hearing Officer. (1) Functions of a hearing officer. An independent hearing officer shall preside at the administrative hearing, shall keep order, and shall conduct the administrative hearing. The hearing officer shall:

- (a) Administer oaths and affirmations;
- (b) Issue subpoenas in accordance with Section 8 of this administrative regulation;
- (c) Issue appropriate orders relating to discovery in accordance with 400 KAR 1:040;
- (d) Rule on procedural requests or similar matters;
- (e) Preside over prehearing conferences for settlement or simplification of the issues;
- (f) Regulate the course of the administrative hearing;
- (g) Rule on offers of proof and receive relevant evidence;
- (h) Rule on a motion for summary disposition in accordance with Section 17 of this administrative regulation;
- (i) Rule on a motion for directed recommendation in accordance with Section 18 of this administrative regulation;
- (j) Issue an order for temporary relief in accordance with 400 KAR 1:110~~[405 KAR 7:092]~~, Section 11 and 400 KAR 1:120~~[405 KAR 7:095]~~, Section 7;
- (k) Serve as a mediator in accordance with Section 23 of this administrative regulation;
- (l) Take any other action authorized by KRS Chapters 146, 149, 151, 223, 224, 350, and the administrative regulations promulgated pursuant thereto; and
- (m) Make or recommend decisions or reports in accordance with KRS Chapters 146, 149, 151, 223, 224, 350, and the administrative regulations promulgated pursuant thereto.

(2) No Authority to Grant Injunctive Relief or a Stay. Notwithstanding the right to grant temporary relief in accordance with 400 KAR 1:110~~[405 KAR 7:092]~~, Section 11 and 400 KAR 1:120~~[405 KAR 7:095]~~, Section 7, a hearing officer shall not have any independent authority to grant injunctive relief or a request for a stay of any statutory, regulatory, or permit requirement.

(3) Ex parte communication.

(a) Except to the extent required for the disposition of an ex parte matter as authorized by law, the hearing officer shall not discuss the merits of an administrative hearing or proceeding with a person identified in subparagraphs 1. through 3. of this paragraph, unless the communication, if oral, is made in the presence of each and every party or their representative, or, if written, is furnished to each party.

1. A party to the proceeding;

2. A person interested in the proceeding; or

3. A representative of a party.

(b) Office personnel involved or who may become involved in the decision making process of an administrative hearing shall not discuss the merits of an administrative hearing or proceeding with a person identified in paragraph (a)1. through 3. of this subsection, unless the communication, if oral, is made in the presence of every other party or their representative, or, if written, is furnished to every party.

(c) The hearing officer and office personnel may discuss the case status or provide advice concerning compliance with a procedural requirement with a person identified in paragraph (a)1. through 3. of this subsection, unless the area of inquiry is in fact an area of controversy in the administrative hearing or proceeding over which the hearing officer is presiding.

(d) An oral communication made in violation of this subsection shall be reduced to writing in a memorandum by the person receiving the communication and shall be included in the record.

(e) A written communication made in violation of this administrative regulation shall be included in the record and a copy of the memorandum or communication shall be provided to each party, who shall be given an opportunity to respond in writing.

(4) Disqualification. The hearing officer shall withdraw from a case if, according to recognized canons of judicial ethics, the hearing officer deems it appropriate. If prior to a decision of the hearing officer, an affidavit of personal bias or disqualification with substantiating facts is filed, and the hearing officer concerned does not withdraw, the secretary shall determine the matter of disqualification.

Section 8. Subpoena. (1) If requested by a party, the hearing officer shall issue a subpoena requiring the attendance of a witness or production of a book, paper, document, or tangible thing designated therein, or both, at an administrative hearing or at the taking of a deposition.

(2) A subpoena shall be issued using OAH 100 or OAH 101.

(3) A subpoena may be served by:

(a) A person who is not less than eighteen (18) years of age; or

(b) Certified mail, return receipt requested.

(4) The original subpoena bearing a certificate of service shall be filed with the office.

(5) The return receipt if signed by the addressee's authorized agent shall constitute proof of service of the subpoena.

Section 9. De Novo Review. An administrative hearing shall be de novo as to all issues of fact and law. A previous final order on the merits shall be binding against each party or any party in privity with the original party to that action in regard to the issues determined by that final order.

Section 10. Right to Counsel, Entry of Appearance, and Notice of Withdrawal. (1) Right to counsel. A party to an administrative hearing may be represented by counsel. The hearing officer shall permit any party to represent his own interests, except a party that is a corporation or limited liability company shall only be represented by an attorney licensed to practice law in the Commonwealth of Kentucky. The failure of the corporation or limited liability company to appear by counsel, without good cause, shall be grounds for default.

(2) Filing of notice of entry of appearance.

(a) An attorney representing a party before the office shall file a written notice of entry of appearance in each case before the attorney may practice in that case before the office.

(b) The notice of entry of appearance shall set forth the current, complete and correct name,

address, telephone number, and facsimile number, if any, and electronic mail address, if any.

(c) An attorney is not required to file a separate notice of entry of appearance if the attorney files a pleading on behalf of attorney's client.

(3) Withdrawal of representation. An attorney of record shall not withdraw from representation in a proceeding before the office without leave of the hearing officer. Leave shall be given unless the hearing officer determines that the withdrawal will result in substantial prejudice or will unduly delay the consideration and resolution of the case.

(4) Filing of notice of change of address. Each party or, if the party is represented, the party's counsel, shall notify the office of any change of address, telephone number, electronic mail address, or facsimile number by filing a notice of change of address in the record within fourteen (14) days of the change.

Section 11. Prehearing Conference. A hearing officer may order a prehearing conference to be held in person or by telephone to:

- (1) Simplify and clarify the issue;
- (2) Receive a stipulation and admission;
- (3) Explore the possibility of agreement to dispose of any issue in dispute; and
- (4) Address any motions.

Section 12. Motion Practice. (1) General provisions.

(a) A request for relief, which is not required to be made in a pleading, shall be in the form of a motion and shall indicate in the caption the nature of the motion.

(b) A motion filed with the office shall state precisely the relief requested, and include a citation to the record, the administrative regulations, or the law as appropriate.

(c) A written motion shall comply with the provisions of this section. Failure to comply with this section may be grounds for denying the motion.

(2) Supporting memorandum.

(a) A motion filed with the office, including a motion to dismiss, a motion for summary disposition, a motion to strike, and a motion on the pleadings, shall be accompanied by a memorandum setting forth the grounds for the motion and shall contain a citation to any authority relied upon.

(b) The memorandum shall be no longer than twenty-five (25) pages in length and may be filed in the office without prior leave of a hearing officer.

(3) Response. Any party served with a motion may file a response memorandum opposing the motion, with a citation to any supporting authority.

(a) A response memorandum shall be filed no later than fifteen (15) days of the date of service of a motion.

(b) The time for filing a response memorandum may be extended once, without leave of the hearing officer, for no more than thirty (30) additional days if each party enters into a written agreement that is filed in the office prior to the deadline for filing the initial response.

(c) A response memorandum longer than twenty-five (25) pages in length shall not be filed in the office without approval of a hearing officer.

(d) A response memorandum shall indicate in its caption that it is a response memorandum.

(4) Reply. Any party served with a response memorandum may file a reply memorandum addressing only the matter initially raised in the response.

(a) A reply memorandum shall be filed no later than five (5) days of the date of service of a response memorandum unless a different reply period is ordered by the hearing officer.

(b) The time for filing a reply memorandum may be extended once without leave of the hearing officer for no more than ten (10) additional days if each party enters into a written agree-

ment that is filed in the office prior to the deadline for filing the initial reply.

(c) A reply memorandum longer than ten (10) pages in length shall not be filed in the office without prior leave of a hearing officer.

(d) A reply memorandum shall indicate in its caption that it is a reply memorandum.

(5) Failure to file supporting memorandum. The hearing officer may find or recommend entry of an order against a party failing to file a supporting memorandum in support of a motion, response or reply.

(6) Proposed order.

(a) A party who files a motion or response shall simultaneously tender a proposed order granting the requested relief or denying the motion.

(b) The office shall not accept for filing a motion or response unless accompanied by a tendered proposed order.

(c) The tendered order shall contain a service page listing the current, correct, and complete names and addresses of each party and counsel of record upon whom the office is required to serve the order.

(d) A party may submit a proposed order in electronic form if accompanied by a hard copy.

(7) Hearing on a motion.

(a) Any party making a motion may request that the motion be heard before the hearing officer.

(b) Upon receipt of the request for a hearing on a motion, the hearing officer may schedule a hearing after the time for all responses and replies pursuant to this section has expired, if the hearing officer determines that oral arguments could provide additional information to form the basis of the ruling.

(c) Court reporter. Any party may arrange for a court reporter to record a hearing on a motion, as long as the party bears the costs.

(d) Failure to appear at hearing. A hearing officer may deny a motion for which the movant who requested the hearing fails to appear. A hearing officer may grant a motion for which a movant requests a hearing and the nonmovant fails to appear, upon proof by the movant filed in the record that the motion was served on the nonmoving party.

Section 13. Motion for Continuance of Formal Administrative Hearing. (1) The hearing officer shall not grant a motion for continuance unless good cause is shown.

(2) The hearing officer shall not grant a motion for continuance of an administrative hearing if filed within fifteen (15) days of the scheduled date for the administrative hearing unless compelling cause is shown.

Section 14. Motion for Intervention and Consolidation. (1) Who may file. A person may petition in writing for leave to intervene at any stage of a proceeding. A person shall set forth a statement describing the person's interest and, if required, a showing of why the interest is or may be adversely affected.

(2) Criteria to intervene.

(a) The hearing officer shall grant intervention if the person:

1. Had a statutory right to initiate the proceeding in which the person requests to intervene;

or

2. Has an interest that is or may be adversely affected by the outcome of the proceeding.

(b) If the criteria set forth in paragraph (a) of this subsection does not apply, the hearing officer shall consider the following in determining if intervention is appropriate:

1. The nature of the issues;

2. The adequacy of representation of the person's interest which is provided by the existing

parties to the proceeding;

3. The ability of the person to present relevant evidence and argument; and

4. The effect of intervention on the cabinet's implementation of its statutory mandate.

(3) Effect of ruling. A person granted leave to intervene in a proceeding may participate in the proceeding as a full party or in a limited capacity. The hearing officer shall determine the extent and terms of the participation, having due regard for the interests of justice and the orderly and prompt conduct of the proceeding. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceeding; and

(c) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(4) Consolidation. If proceedings involving the same parties or a common question of law or fact are pending before the office, the proceedings shall be subject to consolidation pursuant to a motion by a party or upon the initiative of the hearing officer.

Section 15. Dismissal for Failure to Prosecute. Once per year the office shall determine all cases in which no activity has been taken for one (1) year or more. The hearing officer to whom a case is assigned shall issue an order directing the petitioner to show cause why the case should not be dismissed. If the petitioner does not show good cause why the case should not be dismissed, the hearing officer shall recommend dismissal of the case with prejudice for failure to prosecute.

Section 16. Evidence. (1) Admissibility. Unless specifically excluded by subsection (2) this section, evidence that would otherwise not be admissible under the Kentucky Rules of Evidence may be admitted by the hearing officer, if determined by the hearing officer:

(a) To be necessary to ascertain facts not reasonably susceptible to proof under rules of evidence; and

(b) Is a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs.

(2) The hearing officer shall exclude:

(a) Irrelevant, immaterial, or unduly repetitious evidence from the record;

(b) Evidence designated as confidential by statute; and

(c) Evidence protected pursuant to a privilege recognized by law.

(3) An objection may be made by a party and shall be noted in the record by hearing officer.

(4) The hearing officer may require each party to submit any part of the evidence in written form if:

(a) An administrative hearing will be expedited; and

(b) The interests of each party will not be substantially prejudiced.

(5) Documentary evidence may be received in the form of a copy or excerpt. Upon request of any party, each party shall be given an opportunity to compare the copy with the original.

(6) A party may conduct cross-examination as required for a full and true disclosure of the facts.

(7) The hearing officer may take notice of generally recognized technical or scientific facts within the cabinet's specialized knowledge. The hearing officer shall notify each party of the material noticed either before or during the administrative hearing, or by reference in the report and recommended order. Each party shall be afforded an opportunity to contest the material so noticed by the hearing officer.

(8) The cabinet's experience, technical competence, and specialized knowledge may be utilized by the hearing officer in the evaluation of the evidence.

Section 17. Summary Disposition. At any time after a proceeding has begun, a party may move for a summary disposition of the whole or part of a case, in which event the following procedures shall apply:

(1) The moving party shall verify any allegation of fact with a supporting affidavit, unless the moving party is relying upon:

- (a) A deposition,
- (b) An answer to an interrogatory,
- (c) An admission, or
- (d) Any document produced upon request to verify such allegation.

(2) A hearing officer may grant a motion for summary disposition and render a report and recommended order to the secretary under this section if the record shows that:

- (a) There is no genuine issue as to any material fact; and
- (b) The moving party is entitled to a summary disposition as a matter of law.

(3) If a motion for a summary disposition is not granted for the entire case or for all the relief requested and an evidentiary hearing on some or all of the issues is necessary, the hearing officer shall and upon examination of all relevant documents and evidence, ascertain what material facts are actually and in good faith controverted. The hearing officer shall issue an interim report specifying the facts that appear without substantial controversy and direct further proceedings as deemed appropriate.

Section 18. Directed Recommendation. (1) At the close of the presentation of evidence by a party at an administrative hearing, the opposing party may move the hearing officer for a directed recommendation to the secretary.

(2) The moving party shall state the specific grounds in support of the request for a directed recommendation.

(3) The hearing officer shall consider all of the evidence presented at the administrative hearing by the nonmoving party and shall draw all inferences in favor of the nonmoving party.

(4) If the hearing officer determines that the nonmoving party has failed to meet his burden of proof, the hearing officer shall:

- (a) Grant the moving party's motion; and
 - (b) Recommend that the secretary deny the nonmoving party's request for relief.
- (5) A motion for a directed recommendation is not a waiver of an administrative hearing.

(6) A party who moves for a directed recommendation may move forward and offer evidence to the same extent as if the motion had not been made and without having to reserve the right to offer the evidence.

Section 19. Orders to Abate and Alleviate. (1) Notice.

(a) If the secretary issues an order to abate or alleviate pursuant to KRS 224.10-410, the secretary shall file a copy of the order in the office.

(b) Upon filing an order to abate or alleviate, the office shall issue an administrative summons pursuant to Section 5 of this administrative regulation and shall set the time and place for an administrative hearing to be held within ten (10) days from the date the order to abate or alleviate was signed by the secretary.

(2) Response.

(a) The person named in the order to abate or alleviate shall prior to or at the administrative hearing file a response to the order that:

1. Specifically admits or denies the facts alleged in the order;
2. Sets forth other matters to be considered on review; and
3. Sets forth evidence, if any, that the condition or activity does not violate the provisions of KRS 224.10-410.

(b) In lieu of a response, the person named in the order to abate or alleviate may contact the office in writing or by other means and state that an administrative hearing is not needed, and that the person does not desire to contest the order.

(3) Hearing procedure. The administrative hearing shall be held in accordance with this administrative regulation.

(4) Burden of proof. The cabinet shall have the burden of going forward to establish a prima facie case as to the propriety of the abate and alleviate order. The person named in the abate and alleviate order shall have the ultimate burden of persuasion that the condition or activity does not violate KRS 224.10-410, or that the condition or activity has been discontinued, abated, or alleviated.

(5) Default. The hearing officer shall promptly prepare a report stating that the hearing has been waived and the order to abate or alleviate stands as issued if:

(a) The person named in the order to abate or alleviate notified the office that an administrative hearing is not needed; or

(b) Upon failure of the person to appear at the administrative hearing.

(6) Effect of the proceeding. The scheduling and holding of an administrative hearing pursuant to this section shall not operate to terminate or stay the order or the affirmative obligation imposed on a person by the order.

Section 20. Report and Recommended Order and Any Exception. (1) Time.

(a) With the exception of paragraph (b) and (c) of this subsection, the hearing officer shall make a report and recommended order to the secretary within thirty (30) days of the close of the record.

(b) In a hearing brought in accordance with 400 KAR 1:110~~[405 KAR 7:092]~~, Section 8, permit determinations, the hearing officer shall make a report and recommended order within twenty (20) days of the close of the record.

(c) If the secretary finds upon written request of the hearing officer that additional time is needed to submit the report and recommended order, the secretary may grant an extension. If granted by the secretary, all parties shall be notified.

(2) Preponderance of the Evidence.

(a) The report and recommended order shall be based on a preponderance of the evidence appearing in the record as a whole and shall contain appropriate findings of fact and conclusions of law.

(b) The report and recommended order may depart from prior interpretations of the law by the cabinet if the hearing officer explicitly and rationally justifies the change of position.

(3) Civil Penalty Determination.

(a) The hearing officer shall recommend the amount of a civil penalty based on the record.

(b) The hearing officer may compute the amount of the penalty to be assessed irrespective of any computation offered by any party.

(c) In actions brought pursuant to 400 KAR 1:110~~[405 KAR 7:092]~~, the hearing officer shall consider the same factors set forth in 400 KAR 1:110~~[405 KAR 7:092]~~, Section 3(2) for consideration in recommending the penalty assessment.

(d) The hearing officer shall state with particularity the reasons, supported by the record, for the penalty recommended in the report and recommended order.

(4) Mailing. The report and recommended order shall be mailed, postage prepaid, to each

party and the party's attorney of record.

(5) Exceptions. A party may file an exception and a response to the exception as allowed pursuant to KRS 149.346, 151.184, 224.10-440, and KRS 350.0301. There shall be no further submissions in the record.

(a) Each exception and response shall conform to the format for filing a document in Section 3 of this administrative regulation.

(b) A party filing an exception to a report and recommended order shall tender with the exception a draft recommended order for the secretary.

1. The excepting party's draft recommended order shall set out the relief the party requests in its exception.

2. The draft recommended order shall contain a service page listing the current, correct, and complete name and address of each party and counsel of record upon whom the office shall be required to serve the order.

3. A party may submit a draft recommended order in electronic form if accompanied by a hard copy.

(c) Good cause exception. The secretary may exempt a party from compliance with paragraphs (a) and (b) of this subsection upon a showing of good cause or undue hardship.

Section 21. Secretary's Order. (1) The secretary shall consider the hearing officer's report and recommended order, any exception filed, and response to any exception if permitted by statute, and decide the case within the time period required by statute.

(2) The secretary may:

(a) Remand the matter to the hearing officer;

(b) Adopt the report and recommended order of the hearing officer as a final order;

(c) Adopt part of the report and recommended order of the hearing officer and issue a final order; or

(d) Reject the report and recommended order of the hearing officer and issue a final order.

(3) The final order of the secretary shall be mailed postage prepaid to each party and the party's attorney of record.

(4) A final order of the secretary shall be based on substantial evidence appearing in the record as a whole and shall set forth the decision of the secretary and the facts and law upon which the decision is based.

(5) The final order may depart from prior interpretations of the law by the cabinet if the secretary explicitly and rationally justifies the change of position.

Section 22. Agreed Order. ~~[(4)]~~ An agreed order that resolves any claim or part of a claim in a case pending in the office shall be tendered to the hearing officer for acknowledgment by signature before being presented to the secretary.

Section 23. Mediation. (1) Referral to mediation.

(a) At any time prior to the conclusion of the final prehearing conference, a hearing officer may issue an order referring all or any part of any case to nonbinding mediation.

(b) A case shall not be referred for mediation if the cabinet advises the hearing officer that mediation would require a deviation from a statutory or regulatory requirement.

(2) Mediator.

(a) A case may be referred to any hearing officer employed by the office or a mediator approved by the chief hearing officer.

(b) The mediator shall notify the hearing officer in writing when a case is not accepted for mediation.

(c) Disqualification of a mediator.

1. Any party may move the hearing officer to enter an order disqualifying the mediator for good cause. Employment by the cabinet shall not constitute good cause for the disqualification.

2. If the hearing officer rules that a mediator is disqualified from mediating the case, the hearing officer shall enter an order referring the matter to another mediator.

3. Nothing in this provision shall preclude a mediator from disqualifying himself or refusing any assignment.

4. Unless the hearing officer orders otherwise, the time for mediation shall be tolled during any periods in which a motion to disqualify is pending.

(3) Statements not admissible. Statements or admissions made for the purpose of mediation shall not be:

(a) Subject to disclosure through discovery;

(b) Admitted in evidence at an administrative hearing; or

(c) Used by the hearing officer in making any report and recommended order.

(4) Proceeding not stayed. Unless otherwise ordered by the hearing officer or agreed to in writing by the parties, the mediation shall not operate as a stay of discovery or other prehearing proceeding.

(5) Mediation conference.

(a) Mediation status conference. In the mediation referral order, the hearing officer shall schedule a mediation status conference to be held within thirty (30) days from the entry of the mediation referral order unless otherwise agreed to in writing by the parties.

(b) Scheduling a Mediation Conference.

1. The mediator shall schedule a mediation conference within thirty (30) days of the mediation status conference unless otherwise agreed to by the parties.

2. The mediator may schedule as many conferences as are necessary to complete the process of mediation.

(c) Purpose of the mediation conference. The conference shall be conducted by the mediator to consider the possibility of settlement, the simplification of each issue, and any other matter that the mediator and each party determines may aid in the handling or the disposition of the proceeding.

(d) Appearance at mediation conference.

1. Each party or a representative of the party, having authority to negotiate on behalf of that party, shall attend the mediation.

2. Counsel may also be present.

(e) Production of a document and witness. The mediator may request that a party bring a document or witness, including an expert witness, to the mediation conference, but shall not have authority to order production.

(f) The mediation conference shall continue until:

1. A settlement is reached;

2. Any party is unwilling to proceed further; or

3. The mediator determines that further efforts would be of no avail.

(6) Reporting to the hearing officer.

(a) After the conclusion of the first mediation conference, any party may move the hearing officer to remove the case from mediation and to set the case for a prehearing conference or an administrative hearing.

(b) If any party is unwilling to proceed further or if the mediator determines that further efforts would be of no avail, then the mediator shall file a report to the hearing officer that the mediation process has ended. The report shall state the lack of an agreement and shall not

make other comment or recommendation.

(c) If a case is settled prior to or during mediation, an attorney for one (1) of the parties shall:

1. Full Settlement.

a. Within ten (10) days of the conclusion of mediation, file with the office a joint statement that all issues have been resolved; and

b. Promptly prepare and submit to the hearing officer an agreed order reflecting the terms of the settlement in accordance with Section 22 of this administrative regulation.

2. Partial settlement.

a. If some but not all of the issues in the case are settled during mediation or if an agreement is reached to limit discovery or on any other matter, the attorney for one (1) party shall, within ten (10) days of the conclusion of mediation, file with the office a joint statement listing the issues that have been resolved and the issues that remain for an administrative hearing.

b. The hearing officer shall then return the matter to the active docket and promptly schedule a prehearing conference or an administrative hearing.

Section 24. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) "Subpoena", OAH 100, November 2016; and

(b) "Subpoena Duces Tecum", OAH 101, November 2016.

(2) This material may be inspected, copied, or obtained, at the Office of Administrative Hearings, 211 Sower Boulevard, 2nd Floor, Frankfort, Kentucky 40601, 8 a.m. to 4:30 p.m., Monday through Friday.

(3) This material may also be obtained on the office Web site at www.oah.ky.gov. (21 Ky.R. 720; 1095; 1463; eff. 12-12-1994; 43 Ky.R. 1855, 2164; 44 Ky.R. 61; eff. 8-4-2017; TAm eff. 5-4-2018.)